Appeal No. 2007AP1396 **Cir. Ct. No. 2007CV194**

WISCONSIN COURT OF APPEALS
DISTRICT II

KELLY J. HARVOT,

PLAINTIFF-APPELLANT,

v.

SOLO CUP COMPANY AND SOLO CUP OPERATING COMPANY,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Snyder and Neubauer, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Does the Wisconsin Family or Medical Leave Act (WFMLA), WIS. STAT. § 103.10, confer an implied statutory right to a jury trial in a civil action for damages?

2. In the alternative, under the test set forth in ***Village Food & Liquor Mart v. H & S Petroleum, Inc.***, 2002 WI 92, 254 Wis. 2d 478, 647 N.W.2d 177, does the Wisconsin State Constitution confer the right to a jury trial in a WFMLA civil action for damages?

BACKGROUND

The facts relevant to this certification are brief and undisputed. Kelly J. Harvot worked for Solo Cup Company and its predecessors since 1984. During this time, she developed a medical condition commonly known as degenerative disc disease. Her condition became worse in 2005, and she missed work on July 25, August 1 and August 2 because of her condition. Harvot requested medical leave for those three dates and supported her request with the required paperwork. Solo denied Harvot's request for medical leave and then fired her on August 15, 2005.

Harvot filed a complaint with the Department of Workforce Development, Equal Rights Division. She alleged that Solo had violated her WFMLA rights when it denied her leave request and then terminated her employment. The ERD investigated Harvot's complaint and determined that there was probable cause to believe Solo had denied Harvot her WFMLA rights. Following a hearing, an administrative law judge held that Solo's actions did in fact violate the WFMLA. The ALJ ordered Solo to stop discriminating against Harvot, provide training to its human resource staff, amend its records to reflect Harvot's medical leave on July 25, and August 1-2, 2005, offer to reinstate Harvot to a position she would have had if she had continued her employment at Solo, make Harvot whole for lost wages and benefits, reimburse her for interest on the net back pay, and to reimburse her for reasonable attorney fees and associated costs.

Harvot then initiated a civil action pursuant to WIS. STAT. § 103.10(13)(a), seeking damages to be determined by a jury. Solo filed a motion to strike the jury demand on grounds there is no statutory or constitutional right to

a jury trial in a WFMLA civil suit. The circuit court granted the motion, holding that the case would be tried to the bench. In its decision, the court stated, "I don't find that the statute expressly allows a jury trial. I'm not convinced that there is an implied right to it …. I don't find that it's anywhere close to the case at hand, what was available in the common law at that time." Harvot appeals.

DISCUSSION

Statutory right to a jury trial under the WFMLA

Harvot first asserts that the WFMLA carries with it an implied right to a jury trial in a civil damages action. She emphasizes that the WFMLA distinguishes between the equitable remedies available in the administrative proceedings and the legal damages available in a civil action. The relevant statutory language from WIS. STAT. §§ 103.10(12)(d) and (13)(a) is as follows:

> [The Division] may order the employer to take action to remedy the violation, including providing requested family leave or medical leave, reinstating an employee, providing back pay accrued … and paying reasonable actual attorney fees ….
>
> ….
>
> An employee … may bring an action in circuit court against an employer to recover damages caused by a violation of [the WFMLA] after the completion of an administrative proceeding, including judicial review, concerning the same violation.

Harvot notes that the statute does not expressly deny the right to a jury trial and distinguishes this from other actions where the legislature has

expressly declared the cases be determined without a jury.[1] She insists that the legislature could have used similar language to preclude a trial by jury for WFMLA actions under WIS. STAT. § 103.10(13), but did not.

Finally, Harvot contends that the remedial nature of civil damages under the WFMLA indicates a legislative intent to afford litigants a jury. For support, Harvot turns to case law construing the federal Family and Medical Leave Act (FMLA). She relies on ***Frizzell v. Southwest Motor Freight***, 154 F.3d 641, 643 (6th Cir. 1998), which states:

> [T]he structure of the FMLA's remedial provisions indicates that Congress intended to create a right to a jury. In the section describing the remedies available under the FMLA, Congress distinguishes between 'damages' and 'equitable relief' ….
>
> The distinction … reflects Congress's intent to make juries available to plaintiffs pursuing [civil damages], while leaving it to the judge to determine whether equitable relief is warranted ….

Harvot also points to several FMLA cases where the plaintiff received a jury trial. *See, e.g.*, ***Haschmann v Time Warner Entm't Co.***, 151 F.3d 591 (7th Cir. 1998); ***Nero v. Indus. Molding Corp.***, 167 F.3d 921 (5th Cir. 1999); and ***Arban v. West Publ'g Corp.***, 345 F.3d 390 (6th Cir. 2003).

Solo responds that the WFMLA is silent on the availability of a jury trial and argues that where the legislature chooses not to create an express statutory right to a jury trial for a statutory civil claim, no right can be inferred.

[1] *See, e.g.* WIS. STAT. § 76.08(1) (review of assessments or adjustments); WIS. STAT. § 227.57(1) (petition for judicial review of Administrative Procedures Act); and WIS. STAT. § 971.14(4)(b) (competency determination regarding mental health treatment).

Solo counters Harvot's reliance on federal case law by noting that Wisconsin courts have rejected federal precedent that conflicts with Wisconsin law: "Wisconsin courts … must construe Wisconsin statutes as it is believed the Wisconsin legislature intended, regardless of how Congress may have intended comparable statutes. Even the United States Supreme Court must abide by this state's interpretation of its laws." ***Goodyear Tire & Rubber Co. v. DILHR***, 87 Wis. 2d 56, 65, 273 N.W.2d 786 (Ct. App. 1978) (analyzing gender discrimination provisions of the Wisconsin Fair Employment Act as distinguished from Title VII of the Civil Rights Act of 1964).

Solo also asserts that the substantive rights under the two statutes are different. An FMLA claimant is entitled to twelve weeks of protected leave for any combination of listed events under 29 U.S.C. § 2612(a)(1), while the WFMLA claimant is entitled to two weeks of leave for a serious health condition, two weeks for the serious health condition of an immediate family member, and six weeks for the birth or adoption of a child. *See* WIS. STAT. § 103.10(3) and (4). Further, Solo notes, the enforcement procedures under the FMLA are different than those under the WFMLA. An FMLA claimant need not exhaust administrative remedies prior to filing a cause of action in federal court. *See* 29 U.S.C. § 2617(a)(2). In contrast, the Wisconsin legislature required WFMLA claimants to file complaints with the DWD first. *See* § 103.10(13) (employee may bring an action in circuit court against an employer to recover damages "after the completion of an administrative proceeding"). Consequently, Solo argues, the federal courts' interpretations of the FMLA are not persuasive authority on the issue of claimant rights under the WFMLA.

Constitutional right to a jury trial

Solo posits that because the legislature did not create a statutory right to a jury trial for a WFMLA claimant, the only remaining avenue available to Harvot is article I, section 5 of the Wisconsin Constitution. The constitution preserves the right of trial by jury by stating, "[T]he right of trial by jury shall remain inviolate." That is, "[t]he right to trial by jury preserved by the constitution is the right as it existed at the time of the adoption of the constitution in 1848." ***Town of Burke v. City of Madison***, 17 Wis. 2d 623, 635, 117 N.W.2d 580 (1962). The parties agree that the issue is governed by the test set forth in ***Village Food.*** "[A] party has a constitutional right to have a statutory claim tried to a jury when: (1) the cause of action created by the statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin Constitution in 1848 and (2) the action was regarded at law in 1848." ***Village Food***, 254 Wis. 2d 478, ¶11.

The first part of the ***Village Food*** test requires the current action to be "essentially [a] counterpart[ ]" to a legal cause of action existing in 1848. *See* ***id.***, ¶28. In ***Village Food***, the court took up the history of the Unfair Sales Act by looking to prohibited trade practices at common law. *See* ***Village Food***, 254 Wis. 2d 478, ¶29. The court concluded that the type of trade practice prohibited at common law and that was addressed in the Unfair Sales Act had "insufficient distinguishing characteristics" to restrict the right to a jury trial. More recently, the court confirmed that there need not be "specific identity between the … violation at bar and an 1848 cause of action," but that slight differences were acceptable so long as the 1848 action was essentially a counterpart to the current cause of action. ***Dane County v. McGrew***, 2005 WI 130, ¶¶20-21, 285 Wis. 2d 519, 699 N.W.2d 890.

Harvot argues that, in keeping with the broad approach espoused in ***Village Food***, the legal lineage of the WFMLA can be traced back to pre-1848 minimum labor standards or fair employment laws. Harvot points to the revised statutes of 1849, which protected apprentices against cruelty and a master's failure to educate them, and instituted remedies for a master's breach of duty toward an apprentice. *See* WIS. STAT. §§ 81.11 through 81.15 (1849). Harvot also directs the court to chapter fourteen, "Of Master and Servant," 1 BLACKSTONE, *Commentaries on the Laws of England*, 423 (1807),[2] where Blackstone discussed the types of servants, the creation and destruction of the servant relationship, and the effect of the relationship on the parties in England at that time. In particular, Blackstone notes that a trade apprentice could be discharged for cause, but where the discharge was the fault of the master's misconduct, a remedy existed. *See* ***id.***, 426 and n.(5) (justices may order the master to deliver up his clothes, and to pay a sum … to place [the apprentice] with another master). Harvot insists that these early labor standards were the essential counterparts to today's WFMLA.

Solo disagrees, arguing that the court's most recent decision on point signals a more narrow analysis is warranted. In ***State v. Schweda***, 2007 WI 100, ¶34, 303 Wis. 2d 353, 736 N.W.2d 49, the court stated that having "doctrinal roots" in the common law was not enough to show that a modern cause of action existed in 1848. The court required more than a "passing resemblance," and rejected Schweda's claim that modern environmental regulations were the essential counterpart to common law nuisance actions. ***Id.***, ¶¶34, 40. Solo asserts that the ***Schweda*** rationale is dispositive because the broadly defined labor

[2] A digitized version of BLACKSTONE, *Commentaries on the Laws of England: In Four Books* (1807) is available online at http://books.google.com/books?id=TZkkAAAAMAAJ.

standards, while providing an "ancestral connection," are not sufficiently analogous to modern WFMLA protections. *See* ***id.***, ¶34. The WFMLA allows employees to take leave, without penalty, for their own illness, the illness of a family member, or the birth or adoption of a child. *See* WIS. STAT. § 103.10. Solo insists the only common link between the WFMLA and the common law fair labor standards is the employment relationship. Under ***Schweda***, this is not enough to satisfy the ***Village Food*** test. *See* ***Schweda***, ¶42.

Village Food also requires that the cause of action be "at law." *See* ***Village Food***, 254 Wis. 2d 478, ¶33. Harvot argues that because the WIS. STAT. § 103.10(12) administrative procedure offers equitable relief, it is logical to conclude that the civil remedy in § 103.10(13) is for *legal* damages. The statute's reference to "damages" is telling, and Harvot directs us to ***Farr v. Spain***, 67 Wis. 631, 632 (1887) for the proposition that an action to recover money is an action at law: "That an action to recover money, given by statute by way of penalty for the neglect or refusal of a party to do a prescribed act … *is legal*, and not equitable, in its character, seems to us a proposition too plain for discussion."

Solo responds that even if an analogous employment law claim existed in 1848, the only remedies were equitable. It offers little in the way of analysis, however, except to assert that the forfeiture remedy available under WIS. STAT. § 81.16 (1849) was equitable in nature. This unsupported assertion, is refuted in ***Columbia County v. Bylewski***, 94 Wis. 2d 153, 162, 288 N.W.2d 129 (1980) (a forfeiture action is a statutory action at law). Nonetheless, case law teaches that "an unfair labor practice proceeding is in the nature of an equitable proceeding, and a money award is a proper incident to equitable relief." *See* ***General Drivers & Helpers Union, Local 662 v. Wisconsin Employment Relations Bd.***, 21 Wis. 2d 242, 251-52, 124 N.W.2d 123 (1963).

CONCLUSION

Whether the WFMLA creates an implied right to a jury trial is a novel and important question. This is particularly pressing because the federal FMLA cases demonstrate that jury trials are often afforded. In the alternative, whether the WFMLA is an essential counterpart to common law labor standards and employment law has never been addressed. A decision by the supreme court will develop and clarify the law, assuring that the constitutional right to a jury trial is not inconsistently interpreted. A pronouncement of the law in this regard will have widespread impact on WFMLA actions throughout the state. For these reasons, we respectfully request that the supreme court accept certification of the issue.